A

Affin Bank Bhd v Millennium Wood Sdn Bhd & Ors

B HIGH COURT (JOHOR BAHRU) — CIVIL ACTION NO 22NCVC-77–04 OF 2014
TEO SAY ENG J
28 MAY 2015

C *Banking — Banks and banking business — Banking facilities — Trade lines and overdraft facilities — Default in repayment — Failure to service monthly instalment payments of banking facilities granted by bank — Facilities recalled by bank after second failure to repay — Whether letter of recall of facilities was certificate of indebtedness*

D

The plaintiff's claim revolved around the recovery of the total outstanding sum owed by the defendants for the amount of RM1,705,934.44 with costs and interests that arose due to the first defendant's failure to service the monthly instalment payments of the banking facilities granted by the plaintiff to the first E defendant. By its letter of offer ('the first LO'), the plaintiff had granted the first defendant banking facilities for the amount of RM8,720,000 which comprised various tradelines facilities as well as overdraft facility ('the said banking facilities'). The second and third defendants, the directors of the first defendant F stood as guarantors for the first defendant in respect of the said banking facilities. The said banking facilities were later reviewed and restructured into term loans vide the plaintiff's letter of offer to be repayable by 60 monthly equal instalments of RM53,058 each inclusive of interest. The first defendant failed to service the aforesaid monthly instalments and as a consequence, the G said banking facilities were recalled. Additionally, the second and third defendants too failed to abide by the plaintiff's demand for payment in respect of their guarantee, hence the plaintiff's claim. The issue for determination was whether the letter of recall of facilities was a certificate of indebtedness. In determining this issue, the court had to interpret cl 15.15 of the facilities H agreement.

Held, allowing the plaintiff's claim of RM15,000:

(1) The defendants abandoned all the defences pleaded in their statement of I defence and confined to the issue of certificate of indebtedness that was, the plaintiff failed to tender any certificate of indebtedness to prove its claim. Having perused cl 15.15, the court was of the considered view that it was broad enough to include the letter of recall issued by the bank.

Once the plaintiff had adduced that the letter of recall had been sent, that was, the certificate of indebtedness, the debt of RM1,691,535.13 was proved (see paras 28–31).

(2) The defendants were precluded from submitting that the sum claimed was not accurate as the defendants failed to adduce any evidence to show that the sum claimed was manifestly erroneous. It was not sufficient to prove manifest error by pointing out the difference of RM14,399.22 in the two different sums claimed within the span of one month. The first defendant failed to challenge or dispute the said demand. On the evidence adduced in totality, the plaintiff had established its claim on the balance of probabilities against the first defendant (see paras 32–34).

(3) The plaintiff had established that the second and third defendants stood as guarantors for the said banking facilities granted by the plaintiff to the first defendant. The plaintiff had also proved that their solicitors had served their notice of demand on the second and third defendants. Hence, the plaintiff had complied with the legal requirements to trigger the second and third defendant's liabilities under the guarantee (specific facilities) agreement. The plaintiff had succeeded in proving its claim against the second and third defendants as guarantors on the balance of probabilities (see paras 35–36).

[Bahasa Malaysia summary

Tuntutan plaintif berkisar sekitar mendapatkan balik jumlah tertunggak yang kena dibayar oleh defendan-defendan bagi jumlah sebanyak RM1,705,934.44 dengan kos dan faedah yang berbangkit akibat kegagalan defendan untuk membayar bayaran ansuran bulanan kemudahan perbankan yang diberikan oleh plaintif kepada defendan pertama. Melalui surat tawarannya ('ST pertama'), plaintif telah memberikan defendan pertama kemudahan perbankan bagi wang sejumlah RM8,720,000 yang terdiri daripada kemudahan akaun kredit dan juga kemudahan overdraf ('kemudahan perbankan tersebut'). Defendan kedua dan ketiga, pengarah-pengarah defendan pertama bertindak sebagai penjamin-penjamin untuk defendan pertama berkaitan kemudahan perbankan tersebut. Kemudahan perbankan tersebut kemudiannya disemak dan disusun semula kepada pinjaman bertempoh melalui surat tawaran plaintif untuk boleh dibayar balik melalui 60 ansuran bulanan yang sama yang setiap sejumlah RM53,058 termasuk faedah. Defendan pertama gagal untuk membayar ansuran bulanan tersebut dan akibatnya, kemudahan perbankan tersebut ditarik balik. Selanjutnya, defendan kedua dan ketiga juga gagal untuk mematuhi tuntutan plaintif untuk bayaran berkaitan jaminan mereka, maka tuntutan plaintif ini. Isu untuk penentuan adalah sama ada surat tarik balik kemudahan adalah sijil hutang. Dalam menentukan isu ini, mahkamah telah mentafsirkan klausa 15.15 perjanjian kemudahan.

Diputuskan, membenarkan tuntutan plaintif sebanyak RM15,000:

(1) Defendan-defendan meninggalkan kesemua pembelaan yang diplid dalam pernyataan pembelaan mereka dan mengehadkan kepada isu sijil hutang iaitu, plaintif gagal untuk menyerahkan apa-apa sijil hutang untuk membuktikan tuntutannya. Setelah meneliti klausa 15.15, mahkamah berpendapat bahawa ia adalah cukup luas untuk memasukkan surat tarik balik yang dikeluarkan oleh bank. Sebaik saja plaintif mendedahkan bahawa surat penarikan balik tersebut telah dihantar, iaitu, sijil hutang, hutang sebanyak RM1,691,535.13 telah dibuktikan (lihat perenggan 28–31).

(2) Defendan-defendan dihalang daripada berhujah bahawa jumlah yang dituntut adalah tidak tepat kerana defendan-defendan gagal untuk mengemukakan apa-apa keterangan untuk menunjukkan bahawa jumlah yang dituntut adalah jelas salah. Ia tidak mencukupi untuk membuktikan kesalahan yang jelas dengan menunjukkan perbezaan jumlah RM14,399.22 dalam dua jumlah berbeza yang dituntut dalam tempoh satu bulan. Defendan pertama gagal untuk mencabar atau mempertikaikan tuntutan tersebut. Atas keterangan yang dikemukakan secara keseluruhan, plaintif telah membuktikan tuntutannya atas imbangan kebarangkalian terhadap defendan pertama (lihat perenggan 32–34).

(3) Plaintif telah membuktikan bahawa defendan kedua dan ketiga yang bertindak sebagai penjamin-penjamin untuk kemudahan perbankan tersebut yang diberi oleh plaintif kepada defendan pertama. Plaintif juga telah membuktikan bahawa peguam cara-peguam cara mereka telah menyerahkan notis tuntutan ke atas defendan kedua dan ketiga. Maka, plaintif telah mematuhi dengan kehendak undang-undang untuk membangkitkan lialibiliti defendan kedua dan ketiga di bawah perjanjian jaminan (kemudahan spesifik). Plaintif telah berjaya dalam membuktikan tuntutannya terhadap defendan kedua dan ketiga sebagai penjamin-penjamin atas imbangan kebarangkalian (lihat perenggan 35–36).]

Notes

For cases on banking facilities, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 2571–2573.

Cases referred to

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Hong Leong Bank Bhd v M Muthiah @ Nagappan & Anor and another appeal [2014] 1 MLJ 1; [2014] 1 CLJ 532, FC (refd)

Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2

MLJ 31; [2004] CLJ 532, CA (refd)
Tan Chong Keat v Pengurusan Danaharta Nasional Bhd [2008] MLJU 289; [2008] 4 CLJ 748, CA (refd)

Mohd Faizal bin Ahmad (Hazelin & Assoc) for the plaintiff.
Nor Shahid bin Abd Malik (Nor Shahid bin Abd Malik & Assoc) for the first, second and third defendants.

Teo Say Eng J:

BACKGROUND FACTS

[1] The plaintiff's claim revolves around the recovery of the total outstanding sum owed by the defendants for the amount of RM1,705,934.44 calculated as at 28 February 2014 together with interests and costs thereon as pleaded in the amended statement of claim that arose due to the first defendant's failure to service the monthly instalment payments of the banking facilities which were granted by the plaintiff to the first defendant.

[2] By its letter of offer dated 20 August 2009 ('the first LO') the plaintiff had granted the first defendant banking facilities for the total amount of RM8,720,000 which comprised various tradelines facilities as well as overdraft facility ('the said banking facilities').

[3] The second and third defendants who were and still are the directors of the first defendant stood as guarantors for the first defendant in respect of the said banking facilities.

[4] The said banking facilities were later reviewed and restructured into term loans (I) and (II) vide the plaintiff's letter of offer dated 25 June 2012 to be repayable by 60 monthly equal instalments of RM53,058 each inclusive of interest.

[5] The first defendant failed to service the aforesaid monthly instalments and as a consequence thereto the said banking facilities were recalled. Additionally the second and third defendants too failed to abide by the plaintiff's demand for payment in respect of their guarantee, hence the plaintiff's claim.

THE PLAINTIFF'S SUBMISSION

[6] The plaintiff submits that based on the evidence adduced at the trial, the following facts were established which are both germane and uncontroverted:

(a) firstly it is beyond dispute that the first defendant had accepted and executed the first LO dated 20 August 2009 and therefore agreed to be bound by the terms and conditions contained therein.

a copy of the first LO can be seen at pp 1–21 of Bundle (B). The first defendant's acceptance of the terms and conditions of the first LO can be seen at p 6 of Bundle (B).

(b) in addition to the first LO, the first defendant had also executed a facilities agreement dated 20 November 2004. A copy of the said facilities agreement is found at pp 24–118 of Bundle (B) and the affixing of the first defendant's common seal is evident at p 92 of Bundle (B).

(c) it was also established at the trial the second and third defendants had executed a guarantee (Specific Facilities) dated 30 November 2009 (pp 215–251 of Bundle (B)) the purpose of which was to guarantee the payment of the banking facilities made available by the plaintiff to the first defendant.

The second and third defendants had also executed another guarantee (Specific Facilities) dated 21 April 2010 which served a similar purpose of providing an irrevocable guarantee to pay the amount owed by the first defendant under the said banking facilities. A copy of this document can be seen at pp 18–40 of Bundle (B2). The first defendant had also executed a second letter of offer date 1 March 2010 (second LO) a copy of which can be seen at pp 256–272 of Bundle (B).

The following documents were also furnished by the defendants to wit:

(i) notice of assignment from the first defendant to Boustead Penang Shipyard Sdn Bhd dated 28 October 2009.

(refer to p 22 of Bundle (B))

(ii) notice of assignment from the first defendant to Malaysia Marine and Heavy Engineering Sdn Bhd dated 9 November 2009.

(refer to p 23 of Bundle (B)]

(iii) charge over cash deposits (first party) dated 30 November 2009.

(refer to pp 168–193 of Bundle (B))

(iv) letter of set off (First Party) dated 30 November 2009.

(refer to pp 194–214 of Bundle (B))

(v) first party debenture dated 30 November 2009.

(refer to pp 119–167 of Bundle (B))

(vi) charge over cash deposits (First Party) dated 23 March 2010.

(refer to pp 273–299 of Bundle (B))

(vii) letter of set off (First Party) dated 23 March 2010.

(refer to pp 300–302 of Bundle (B))

By a letter dated 25 June 2012 (the third LO), the first defendant had accepted the plaintiff's offer to revise and restructure the said banking facilities into a term loan facility based upon the terms and conditions contained in the third LO. A copy can be seen at pp 1 to 17 of Bundle (B2)).

The third LO also contained the following salient provisions:

(a) Term Loan II

Terms and Conditions

Purpose to settle the outstanding balance of the Temporary Overdraft and the Trade facility.

Tenure Sixty-six (66) months inclusive of six (6) months moratorium on principal.

Repayment

(i) Moratorium on principal for a period of six (6) months from full drawdown of the facility. Interest to be serviced monthly, commencing at the same month and of full drawdown of the facility.

(ii) To be repayable by 60 monthly equal instalments of RM53,058.00 each inclusive of interest. Commencement date shall be six (6) months after full drawdown.

Existing Security

(1) All the existing security is to remain unchanged and, they are to secure the entire banking facilities granted from time to time except the following:-

(d) All the existing Time Deposit and Sinking fund collection shall be uplifted and liquidated for settlement of the Overdraft General facility, inclusive of interest. Thereafter, the residual balance shall be utilised partly to reduce/settle the Temporary Overdraft facility.

(e) The quarterly sinking fund collection shall be ceased immediately.

(a) both DW1 and DW2 admitted during cross-examinations that having executed the first and second LO and all the related security documents in relation to the said banking facilities and that the defendants are bound by the terms and conditioned in those documents.

(b) by its review and renewal letter dated 20 February 2013, the plaintiff had, inter alia, notified the first defendant that payments of the monthly instalment amounts of RM63,058 inclusive of interest shall commence on 28 February 2013 (refer to p 358 to Bundle (B)).

(c) DW1 and DW2 admitted during cross-examinations that the first

defendant had been duly notified about the payment of the monthly instalments under Term Loan II.

(d) the first defendant had defaulted in the payment of the aforesaid monthly instalments.

(e) the plaintiff had issued a letter of recall dated 24 February 2014 claiming for RM1,691,535.13 with interest accrued as at 31 January 2014. The said letter of recall dated 24 February 2014 is found at p 359 of Bundle (B). It is pertinent to note that no evidence was adduced in court to show that the first defendant had challenged the accuracy of the amount claimed by the plaintiff in this letter of recall.

[7] Pursuant to cl 15.15 of the facilities agreement dated 30 November 2009, it is expressly stipulated that:

> Clause 15.15 Certificate of Indebtedness
>
> It is hereby agreed that any admission or acknowledgement in writing by the Borrower, or any Security Party, or any person authorised on their behalves or a judgment (by default or otherwise obtained against any of them) or a settlement of account in writing showing the indebtedness of the Borrower, or any Security Party, which is duly certified by an authorised officer or agent of the Bank, or computer generated notices issued by the Bank which do not require signatures as to the amount of such balance and liabilities incurred or due to the Bank or as to the rate of interest or amount of interest payable shall be binding and conclusive evidence against the Borrower for whatever purpose including as being conclusive evidence of indebtedness in a court of law, save for manifest error.

[8] This clause is certainly wide enough to include the notice or letter of recall issued by the plaintiff on 24 February 2014 at p 359 of Bundle (B).

[9] The plaintiff submits that a certificate of indebtedness operates in the field of adjectival law, excusing the plaintiff from adducing the proof of debt and shifting the burden onto the defendant to disprove the amount claimed: see *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 at p 686 [2006] 3 CLJ 544 at pp 545–546.

[10] The plaintiff further submits that 'once the respondent adduced in evidence the cl 13 certificate of indebtedness, the debt was proved. It was then for the appellant to attack the said certificate on grounds of manifest error': see *Tan Chong Keat v Pengurusan Danaharta Nasional Bhd* [2008] MLJU 289; [2008] 4 CLJ 748.

[11] Based on the afore cited cases, the plaintiff submits that the defendants are precluded from challenging the accuracy of the sum claimed by the plaintiff

since they have failed to adduce any evidence to show that the amount claimed is manifestly erroneous. Additionally, the plaintiff also submits that the first defendant had also failed to challenge or dispute the demand made by the plaintiff through its solicitors' notice of demand dated 3 April 2014 at pp 360–361 of Bundle (B).

[12] Both the second and third defendants stood as guarantors for the said banking facilities granted by the plaintiff to the first defendant. The plaintiff submits that this fact had been established beyond dispute.

[13] Pursuant to cl 2.01 of the guarantee specific facilities agreement executed by both the second and third defendants it is expressly provided that:

> SECTION 2.01 GUARANTEE
>
> In consideration of the Bank entering into the Facilities Agreement with the Borrower to make available or continue to make available the Facilities upon the terms and subject to the conditions therein contained to the Borrower at the request of the Borrower and the Guarantor, the Guarantor hereby unconditionally and irrevocable guarantees, as a continuing obligation, the payment to the Bank on demand all the Guaranteed Amounts together with interest commission discount and all other banking charges and all costs charges and other expenses which the Bank may incur in respect of perfecting the present guarantee or in enforcing or obtaining payment of such monies or in defending prosecuting or otherwise howsoever taking part in and also all other payment and sums hereinafter mentioned or stipulated and other usual banker's charges.

[14] Additionally, under cl 2.02 it is also expressly provided that:

> SECTION 2.02 CONTINUING GUARANTEE
>
> (a) The Guarantor hereby agrees and declares that this Guarantee is expressly intended to be and shall be a continuing guarantee for the payment of the Guaranteed Amounts until the Guaranteed Amounts, including contingent liabilities, have been fully settled and the expired guarantees/bonds/indemnities, documentary or other credits or any instruments whatever from time to time entered into by the Bank for the account of the Borrower have been returned to the Bank, notwithstanding that the Guarantor and/or the Borrower may at any time or from time to time cease to be indebted to the Bank for any period or periods and notwithstanding any settlement of account or accounts or otherwise.
>
> (refer to p 325 of Bundle (B))

[15] Based on the aforesaid provisions, the plaintiff submits that the guarantee provided by the second and third defendants are both an on demand as well as a continuing guarantee.

[16] It is abundantly clear that the plaintiff's solicitors Messrs Hazelin & Assoc had served their notice of demand dated 3 April 2014 on the second and third defendants. Reference is made to pp 11–14 of Bundle (B1): see *Hong Leong Bank Bhd v M Muthiah @ Nagappan & Anor and another appeal* [2014] 1 MLJ 1; [2014] 1 CLJ 532 and *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31; [2004] CLJ 532.

[17] Based on the afore cited authorities, the plaintiff submits that the plaintiff had complied with the legal requirement to trigger the second and third defendants liabilities under the guarantee (specific facilities) agreement dated 21 April 2010.

[18] Based on the foregoing, the plaintiff submits that the plaintiff has succeeded in establishing its claim against the defendants.

THE DEFENDANT'S SUBMISSION

[19] The defendants submit that the legal burden is on the plaintiff to prove its claim against the defendants under s 101 of the Evidence Act 1950.

[20] The plaintiff failed to produce any bank statements or show to the court the computation of the amount claimed as the principal and interest as per the statement of claim.

[21] The defendants have pointed out that the plaintiff made a claim of RM1,691,535.13 as at 31 January 2014 vide its letter of recall dated 24 February 2014 (p 359 of Bundle B).

[22] Whereas the plaintiff had sent a legal notice of demand dated 3 April 2014 vide its solicitors Tetuan Hazelin & Assoc demanding a sum of RM1,705,934.55 as at 28 February 2014 together with interest at the rate of 3.5% and BLR. The defendants say there was a difference of RM14,399.42 within a month between the two sums claimed.

[23] The defendants submit that the plaintiff had a duty to explain the difference in court.

[24] The defendants further submit that in the absence of any explanation of the difference, the plaintiff must at the very least produce a 'Certificate of Indebtedness' as the conclusive proof of the sum owed by the first defendant to the plaintiff: see cl 15.15 of the facilities agreement and *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544.

[25] The defendants submit that the only document tendered in court by the plaintiff is the notice of demand at p 359 Bundle B claiming for RM1,691,535.13 as at 31 January 2014 with interest. The defendants submit that the said letter of demand cannot be regarded as certificate of indebtedness. Neither can the letter of demand dated 3 April 2014 by the plaintiff's solicitors (p 360 Bundle B) be treated as the certificate of indebtedness.

[26] The defendants submit that in the absence of any certificate of indebtedness, the plaintiff was required to adduce oral evidence to explain the difference of RM14,399.22 between the two sums claimed within a span of one month.

[27] For the above reasons the defendants submit that the plaintiff's claim should be dismissed with costs.

RULING OF THE COURT

[28] Having perused the written submissions by both the parties, I find that the defendants have abandoned all the defences pleaded in their statement of defence and confined to the issue of certificate of indebtedness that is, the plaintiff failed to tender any certificate of indebtedness in this court to prove its claim. The defendants contend that the two documents tendered cannot be regarded as certificates of indebtedness.

[29] The issue for determination is whether the letter of recall of facilities issued on 24 February 2014 is a certificate of indebtedness. In determining this issue, the court has to interpret cl 15.15 of the facilities agreement dated 30 November 2009.

[30] Having perused cl 15.15, I am of the considered view that it is broad enough to include the letter of recall issued by the bank dated 24 February 2014 at p 359 of Bundle B.

[31] Once the plaintiff has adduced in evidence that the letter of recall dated 24 February 2014 had been sent, that is, the certificate of indebtedness, the debt of RM1,691,535.13 was proved. It is then for the defendants to attack the said document on the grounds of manifest error.

[32] I rule that the defendants are now precluded from submitting that the sum claimed is not accurate as the defendants failed to adduce any evidence to show that the sum claimed is manifestly erroneous. It is not sufficient to prove manifest error by pointing out the difference of RM14,399.22 in the two different sums claimed within the span of one month.

[33] As regards the sum of RM1,705,934.44 claimed vide the notice of demand dated 3 April 2014 made by the plaintiff's solicitors, I find that the first defendant failed to challenge or dispute the said demand.

[34] On the evidence adduced in totality, I am also satisfied that the plaintiff has established its claim on the balance of probabilities against the first defendant.

[35] As regards the claim by the plaintiff against the second and third defendants, I am satisfied that the plaintiff had established that the second and third defendants stood as guarantors for the said banking facilities granted by the plaintiff to the first defendant. The plaintiff has also proved that their solicitors Messrs Hazelin & Assoc had served their notice of demand dated 3 April 2014 on the second and third defendants. Hence the plaintiff had complied with the legal requirements to trigger the second and third defendant's liabilities under the guarantee (specific facilities) agreement dated 21 April 2010.

[36] On the whole, I find that the plaintiff had succeeded in proving its claim against the second and third defendants as guarantors on the balance of probabilities.

[37] For the above reasons I allowed the plaintiff's claim for prayer 18(i) at 3.5% plus BLR per annum calculated monthly on RM1,705,934.44 from 1 March 2014 until date of judgment and 5% on the judgment sum from the date of judgment until full realisation. I also ordered the defendants to pay the cost of RM15,000 to the plaintiff.

Plaintiff's claim allowed of RM15,000.

Reported by Afiq Mohamad Noor